

Le (Migration) [2020] AATA 683 (19 February 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs Thanh Huyen Le
CASE NUMBER:	1924537
DIBP REFERENCE(S):	BCC2018/1913185, CLF2013/80073
MEMBER:	Hugh Sanderson
DATE:	19 February 2020
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 801 (Partner) visa.

Statement made on 19 February 2020 at 3:29pm

1. **CATCHWORDS**

2. *MIGRATION – cancellation – Partner (Residence) (Class BS) – Subclass 801 (Spouse) – genuine spousal relationship – false and misleading evidence – previous partner application – allegation of contrived relationship – limited financial information provided – lack of joint social activities – conspired to provide false information – children cared for in Vietnam – lack of companionship/emotional support – not satisfied of genuine relationship – credibility issues – decision under review affirmed*

3.

4. **LEGISLATION**

Migration Act 1958 (Cth), ss 5F, 109, 359AA

Migration Regulations 1994 (Cth), r 2.41

CASES

MIAC v Khadgi (2010) 190 FCR 248

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 801 (Partner) visa under s.109(1) of the *Migration Act 1958* (the Act).
6. The delegate cancelled the visa on the basis that the applicant provided incorrect information in support of the grant of her Subclass 801 Partner (Residence) visa when she claimed that she was in a genuine and continuing relationship with the sponsoring partner. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.

Background

7. The applicant is a citizen of Vietnam and is currently 29 years old. She first entered Australia in 2010 on a Student visa. She applied for the grant of a Subclass 820 Partner (Temporary) visa and Subclass 801 Partner (Residence) visa on 15 April 2013. She was sponsored for the grant of the visas by her husband, Anh Duong Nguyen, who is an Australian citizen and is currently 28 years old.
8. The applicant and the sponsor claimed they met each other in July 2011 while the sponsor was working in a nail shop and the applicant was visiting friends there. It was claimed they started dating and after three months the sponsor proposed marriage to the applicant and she agreed. They were married on 17 March 2013.
9. The applicant provided various documents in support of the application including statutory declarations by friends claiming the relationship was genuine, joint bank account statements, receipts of items of personal property purchased and photos of the parties together, including at their wedding.
10. The applicant was granted a Subclass 820 Partner (Temporary) visa on 23 May 2014. In support of the grant of the Subclass 801 Partner (Residence) visa the applicant provided further documents to support the claim that the parties were in a genuine and continuing relationship. This included further photos of the parties together, details of the joint bank account and joint electricity account. The applicant and the sponsor provided statements claiming they were in a genuine and continuing relationship. They claimed they were committed to their relationship and had plans to have children together.
11. The applicant provided a letter from her doctor, Dr Ngo, dated 6 August 2016 stating that she was 31 weeks pregnant with the expected date of birth to be 11 October 2016. The applicant gave birth to a daughter, [Ms A], on [date]. Her birth certificate did not disclose who her father was.
12. In the online application form, the applicant was asked: "Do the applicant and the sponsor have a mutual commitment to a shared life as husband and wife, or as de facto partners, to the exclusion of all others?" She answered "Yes".
13. The applicant confirmed that she had provided complete and correct information in every detail on the form and on any attachments to it.
14. The applicant was granted the Subclass 801 Partner (Residence) visa on 19 September 2016 before the birth of her daughter.

15. The applicant sponsored Duy Thanh Lai for a Partner visa on the basis that the parties were living in a de facto relationship. The application was filed on 10 June 2017. In that application, it was claimed the parties commenced their relationship on 1 December 2016.
16. Information was before the Department which indicated that the applicant had been in a relationship with Mr Lai throughout the period that she had been claiming to be in a relationship with the sponsor. This included the following:
 - In her incoming passenger card dated 7 November 2012, when the applicant was claiming to be in a relationship with the sponsor, she named as the emergency contact person Lai Duy Thanh;
 - DNA results provided by the applicant as to the paternity of her daughter, [Ms A], showed that Mr Lai was the father; and
 - Mr Lai had previously applied for a Partner visa on the basis of being in a relationship with Thi Bao Vy Lisa Tran, however, that application was withdrawn on 16 September 2015.
17. The Department wrote to the applicant on 25 July 2019 setting out the concerns the Department had that her claimed relationship with the sponsor was contrived. It was suggested that she was not in a genuine and continuing relationship or had a mutual commitment to a shared life as husband and wife to the exclusion of all others when she was providing information in support of the grant of the Subclass 801 Partner (Residence) visa. She was invited to comment on or respond to this information.
18. The applicant's agent responded to the allegations claiming as follows:
 - The applicant had been in a genuine relationship with the sponsor until after she was granted the Subclass 801 Partner (Residence) visa;
 - The applicant met Mr Lai when they were working together in a restaurant in July 2012 and because they were friends and co-workers and he had taken her to the airport this was the reason she had nominated him as her emergency contact person in November 2012;
 - In early 2016 the applicant had an argument with the sponsor and she went out with a group of friends which included Mr Lai and she had a one-night sexual relationship with him where she conceived her daughter;
 - Despite that one-night sexual relationship, she maintained her relationship with the sponsor and did not tell him about her relationship with Mr Lai;
 - Her "mother's instinct" told her that her daughter was not the child of the sponsor and she told him of her one-night stand with Mr Lai;
 - The sponsor could not accept or forgive the applicant for her one-night stand with Mr Lai and so ended their relationship;
 - After the birth of their child, the applicant told Mr Lai that he was the father of the child and he then gave support to the applicant and their relationship developed; and
 - The applicant moved in with Mr Lai on 1 December 2016 which was when they commenced their relationship.

19. The movement records of the applicant show that she travelled overseas to Vietnam over the period she claimed to have been in a relationship with the sponsor as follows:
 - From 23 October 2012 to 7 November 2012; and
 - From 26 October 2015 to 10 November 2015.
20. The movement records of the sponsor show that he travelled overseas over the period that it was claimed he was in a relationship with the applicant as follows:
 - From 5 December 2014 to 17 December 2014 to Bali;
 - From 6 November 2015 to 10 November 2015 to Vietnam; and
 - From 14 December 2015 to 26 December 2015 to Hawaii.
21. On his incoming passenger card dated 17 December 2014 the sponsor nominated Thi Nguyet Anh Do as his emergency contact person.
22. The delegate who considered the application found that the applicant was in a contrived relationship with the sponsor. In making this finding, the delegate noted the following:
 - The DNA testing for the applicant's daughter was not obtained until 2 May 2017 and it would, therefore, be implausible that Mr Lai would believe that [Ms A] was his daughter if, as it was claimed by the applicant, she had been in a continuing relationship with the sponsor and only had one sexual encounter with Mr Lai;
 - The home address the applicant provided in her incoming passenger card dated 7 November 2012 on which she nominated Mr Lai as her emergency contact person was the same address that Mr Lai had provided as where he was living with his sponsor, Ms Tran; and
 - The address provided was the home owned by Mr Lai's uncle.
23. Taking into account all these matters, the delegate found that the applicant had not been in a genuine and continuing relationship with the sponsor. The delegate found that the claims that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others at the time the applicant provided information were false and misleading. The delegate found the information provided in support of the grant of the Subclass 801 Partner (Residence) visa was false and misleading. Accordingly, the delegate found there were grounds to cancel the applicant's visa under s.109 of the Act.
24. The delegate noted there was little information provided as to the discretionary factors for not cancelling the visa. The delegate found that the incorrect information was fundamental in the reasons why the applicant was granted her visa. The delegate noted how long the applicant had been living in Australia and the ties she would have developed in Australia. The delegate noted the applicant had been in Australia for an extended period of time on a Student visa, however had not completed many courses of study. The delegate noted that the applicant now had two children, [Ms A] and [Master B] who had been born in Australia, but both of them had spent extended periods of time living out of Australia.
25. In all the circumstances, the delegate found the incorrect information the applicant had provided outweighed the reasons not to cancel her visa. Accordingly, the delegate cancelled the applicant's visa.

Information to the Tribunal

26. The applicant's agent provided submissions arguing that the applicant had not provided false and misleading information in support of her Partner visa application. Submissions were made supporting why, if the Tribunal did find the applicant had provided false and misleading information, the applicant's visa should not be cancelled.
27. Statements were provided by the applicant and sponsor claiming that they had been in a genuine and continuing relationship until it ended on 31 October 2016.
28. The applicant appeared before the Tribunal on 12 February 2020 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The applicant was represented in relation to the review by her registered migration agent who attended the hearing.
29. The Tribunal commenced the hearing by explaining to the applicant the process under s.359AA of the Act. The Tribunal explained to the applicant it would be putting to her information which would be the reason, or a part of the reason for affirming the decision under review. It would explain what the information was, why this information was relevant and then invite the applicant to comment on or respond to the information. If she required more time, she could request an adjournment.
30. The applicant provided details of where she was currently living. She said that two of her siblings were currently living in Australia on Student visas and a third was living in Australia after being granted a Partner visa. Her parents and two other siblings continue to live in Vietnam. Her parents had provided the financial backing to allow her siblings to be able to study in Australia. She said that her parents own a business in Hanoi whereby her father owns various properties and rents them out. She said that her father has visited Australia on two occasions and her mother has visited Australia quite often.
31. The applicant said that she had travelled to Vietnam on one occasion when she was in a relationship with her sponsor. She said that this was to get treatment as she had suffered a miscarriage in April 2015 and she went to Vietnam for tests. She said that the sponsor only spent three days with her in Vietnam as he was busy with work. She said that he had only just started his job and was not able to take any more time off work. The Tribunal said that it appeared that this was a lack of commitment by the sponsor if the applicant was travelling to Vietnam for medical reasons and he was not accompanying her. The applicant said that his new employer would not let him have any time off work and as he was so busy at work he stayed in Australia.
32. The applicant said that she had never had a chance to have any holiday with the sponsor. She said that because they were trying to save money to buy a house together they never went on a holiday together.
33. The applicant said that the sponsor made a trip to Bali but because she was busy at the time she could not go. She said that he went because he wanted to get a tattoo. She said that because they were still young at the time they thought that it would be okay to go on holidays by themselves. She said that living with the sponsor was just like a holiday every day. She said that the sponsor went to Bali with a friend, then said that it was with a group of friends. She said that she only knew one person who the sponsor travelled with but could not recall any of the other friends he travelled with. She said that he had a number of friends but, due to her lack of English, she did not associate with them.

34. The applicant said the sponsor also went on a holiday to Hawaii. She said that he went sometime in 2015, but could not recall when he went and they had quarrels about it. When pressed, she said that she could not recall when the sponsor travelled to Hawaii.
35. The Tribunal referred to the process under s.359AA of the Act. The Tribunal noted that the sponsor's movement records show that he travelled to Hawaii departing on 14 December 2015, a month after the sponsor returned from Vietnam, and the sponsor returned to Australia from Hawaii on 26 December 2015. This was relevant as it was not plausible that the applicant would not be aware that the sponsor travelled to Hawaii for a holiday about a month after she returned from Vietnam if they were living together at that time. It was also inconsistent with the information provided by the applicant that the sponsor could not spend more time in Vietnam due to the fact that he was not able to obtain time off work because he had just started a new job. This undermined the credibility of the information provided by the applicant. This could lead the Tribunal to conclude that the applicant had provided false and misleading information when she claimed that she had been in a genuine and continuing relationship with the sponsor.
36. The applicant said that her miscarriage happened in April 2015 and it wasn't until November 2015 that she got tests done so it wasn't important that the sponsor travel with her. The applicant said that she could not recall the people the sponsor travelled with to Hawaii. She said that they were workmates and the sponsor often went out drinking with them and that she never went with him because she was setting up a business so she did not know who they were.
37. The applicant said that Thi Nguyet Anh Do was the sponsor's mother. She said that as she and the sponsor were moving to so many addresses they used her address for the mail. The applicant confirmed that she had a mobile telephone number at the time.
38. The Tribunal referred to the process under s.359AA of the Act. The Tribunal referred to the sponsor's incoming passenger card dated 17 December 2014 where he identified his mother as his emergency contact person and provided her mobile telephone number. This was relevant as it indicated the sponsor was not in a close relationship with the applicant as he would have nominated her as his emergency contact person if he was in a close relationship with her and indicated they were not in a genuine and continuing relationship.
39. The applicant said that the sponsor nominated his mother because the mail could be sent to her and then redirected to him. The Tribunal noted that he did not provide his mother's postal address, simply her telephone number and he could have provided the applicant's mobile telephone number if they were in a genuine relationship. The applicant said that the sponsor only nominated his mother and that does not mean that he was not in a true relationship with her.
40. The applicant said that her relationship with the sponsor ended two weeks after the birth of her child, [Ms A], on [date]. She said that she had always believed that the sponsor was [Ms A's] father, but after the birth of [Ms A] many friends said that [Ms A] did not look like the sponsor and then she told the sponsor about her one-night stand and the relationship ended. The applicant said that she was continuing to have a sexual relationship with the sponsor at the time [Ms A] was conceived and she only had a one-night stand with her current husband so she still thought that the sponsor was [Ms A's] biological father. Despite this, she did not register the sponsor as [Ms A's] father as there was a lot of confusion.
41. The Tribunal asked the applicant who Manh Guong Nguyen was. The applicant said that she used to work for him and that he saw her and the sponsor together. She said that she stopped working at his place in 2013 but continued to see him as someone like her father. She said that she did not know if he had ever provided a statement in support of anybody

else for a Partner visa. She said that her current husband knows him as her husband is the nephew of his wife.

42. The Tribunal referred to the process under s.359AA of the Act. The Tribunal referred to the statements provided by Manh Guong Nguyen in support of her husband's application for a Partner visa sworn on 16 December 2014 and the fact that he had also provided a statement in support of the applicant's Partner visa sworn on 30 April 2015, two years after she had last worked for him. This was relevant as it indicated that a relative of her husband was assisting them in providing false information about their relationships with the people who were sponsoring them for Partner visas. This could lead the Tribunal to conclude that the applicant had provided false and misleading information to the Department in support of the application.
43. The applicant said that she had Manh Guong Nguyen provide the statement because he knew her well. She said that as he owned a shop he was well respected. She said that he was one person who knows her well. The Tribunal indicated that if the applicant and the sponsor were in a genuine and continuing relationship it would be expected that there would be other friends who socialised with both the applicant and her sponsor who would be able to provide statements. The applicant repeated that Manh Guong Nguyen was one person who knew her. She said that it was just a coincidence that he provided a statement in support of her application as well as her husband's application with his former sponsor.
44. The Tribunal referred to the Department's records which showed that an officer from the Department had attempted to telephone the sponsor in August 2016 to interview him with regards to his claimed relationship with the applicant. The Department's records indicated that after leaving messages on the sponsor's phone on a number of occasions the sponsor telephoned saying that he was not allowed to speak over the phone while working. He advised the departmental officer that any question should be directed to the migration agent. When the delegate said that they wanted to ask personal questions about the relationship the sponsor said that he would contact the delegate again. There are no records which would indicate the sponsor contacted the delegate or participated in an interview as to the genuineness of the relationship.
45. This was relevant as it indicated the sponsor was avoiding providing information to the Department as it may indicate that he was not living with the applicant and their relationship was not genuine. This could lead the Tribunal to conclude the applicant provided false and misleading information in support of the application.
46. The applicant said that the sponsor had said that he had spoken to the solicitor and he would leave everything to the solicitor. She said that the sponsor said that he had tried to contact the Department but that he could only ring during his lunch hour and the departmental officers were always away for lunch at the same time. The Tribunal noted there was no record to indicate that the sponsor had attempted to contact the Department at any time. The applicant said that this was just what the sponsor had told her.
47. The Tribunal referred to the applicant's incoming passenger card dated 7 November 2012 identifying her current husband as her emergency contact person. This was relevant as it indicated that she was in a continuing relationship with her husband at that time and not in a continuing relationship with the sponsor.
48. The applicant said that because her current husband drove her to the airport she thought that she should nominate him as her emergency contact person and he was the manager where she worked. She said using his name was just normal. The Tribunal noted that it seemed strange that she would not have nominated the sponsor who she married four months later. The applicant said that the sponsor did not propose marriage to her until 14

February 2013 so it was normal that she would nominate her current husband who was her manager at her work.

49. The applicant said that [Ms A] had travelled to Vietnam a few times since her birth, spending about two weeks or one month there. She said that [Master B] had spent about a year there after turning eight weeks old. She said that she was having financial problems in Australia which was why it was decided to send the children to Vietnam to be looked after by her mother and mother-in-law as both she and her husband were trying to work hard to save money.
50. The Tribunal referred to the process under s.359AA of the Act. The Tribunal referred to the movement records of [Ms A] which showed that she had spent more than nine months living in Vietnam. This was relevant as it indicated that there would be no difficulties in the applicant's children travelling with the applicant to Vietnam if the applicant's visa was cancelled.
51. The applicant said that the decision to send her children to Vietnam hurt her and her children would not be able to live there. She said that the children are Australian citizens and they need to be able to live in Australia.
52. The Tribunal invited the applicant to provide any reasons why her visa should not be cancelled. The applicant said that she had not done anything wrong and had not provided any false and misleading information. She said that there would be an adverse effect on her children if she were required to return to Vietnam. She said that she had put a lot of effort into establishing herself in Australia and has her own business which employs people and she pays tax. She said that she bought a house in 2019 paying \$800,000 and borrowing \$600,000.
53. After the hearing, the applicant provided a statement where she made the following claims:
 - When the applicant went to Vietnam in 2015 her husband was not able to travel with her because he was busy with work and her mother was able to provide her support at that time;
 - As the applicant was unwell during her trip to Vietnam, the husband travelled there for three days to be able to accompany her back to Australia;
 - As so many things have happened to the applicant since the end of her relationship, she could not remember all the dates that she had travelled to Vietnam, let alone when the sponsor had travelled overseas;
 - The sponsor nominated his mother as his emergency contact person because she speaks English fluently and they agreed that she was the best person to talk to in emergency situations;
 - At the time of [Ms A's] birth, the applicant was not sure who the father was which was why she left the information blank;
 - The applicant was a good friend of Manh Guong Nguyen which was why she asked him to provide a statement in support of her application and she did not know that he had also provided a statement to support her current husband's previous Partner visa application;
 - If her relationship with the sponsor was contrived then she would have waited until she became an Australian citizen before she sponsored her husband; and

- If the applicant's visa is cancelled, many people's lives would be impacted including her children, her husband and her employees.

54. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

55. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with s.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
56. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
57. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

Was there non-compliance as described in the s.107 notice?

58. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101 by the applicant claiming that she was in a genuine and continuing relationship with her sponsor and they had a mutual commitment to a shared life as husband and wife to the exclusion of all others when she was not in a relationship with her sponsor.
59. In response to the notice from the Department, the applicant claimed that she had been in a genuine and continuing relationship with the sponsor and they had a mutual commitment to a shared life as husband and wife to the exclusion of all others until the relationship ended. She claimed the relationship did not end until October 2016, after she had been granted the Subclass 801 Partner (Residence) visa.
60. The Tribunal has first considered whether the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner at the time that she was claiming that she and the sponsor were in a genuine and continuing relationship and had a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Financial aspects

61. Apart from the statements provided by the applicant and the sponsor there was little further information provided in support of the application. Statements were provided from a bank account in the joint names of the parties and details of an electricity account in the joint names of the parties were provided. The receipt for the purchase of items of personal property in the joint names of the parties was provided. The applicant's individual tax return was provided. Photos were provided together with statements from a friend of the applicant and the sponsor's mother in support of the application.

62. The bank statements provide little information which would indicate the parties were pooling their financial resources or sharing day-to-day household expenses. The deposits into the account are mainly cash deposits or internet transfers from a different account. Details of that account are not provided. It does not indicate that the parties' incomes were being paid into this account or that the account was being used jointly for the parties' savings or joint expenses.
63. The details of the electricity account are based on information provided by the parties. There is no independent assessment by the energy provider that the parties were living together or that they were sharing the expenses of that account. The Tribunal places no weight on that document as indicating the financial aspects of the relationship indicate the parties are in a genuine relationship. Similarly, the individual tax return provides no information which would indicate the applicant and the sponsor were ever in a genuine relationship.
64. Overall, there is little in the financial aspects of the relationship which would indicate the parties were at the relevant time in a genuine and continuing relationship or had a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Nature of the household

65. The documents provided in support of the application, such as the bank statements, the electricity account and the receipt from Bing Lee, indicate the parties were residing together at a shared residence. Statements from the applicant's former employer and the sponsor's mother were provided to support this claim. There is little information as to any living arrangements within that house which would indicate the parties had a shared household together which would be indicative of a genuine and continuing relationship.
66. During the hearing before the Tribunal, the applicant was aware the sponsor had travelled on a holiday to Hawaii, however, was unable to provide details of when he went on this holiday. That trip took place in December 2015, a month after the applicant had travelled to Vietnam to obtain medical treatment after she had suffered a miscarriage. The Tribunal does not accept that if the parties were living together that the applicant would not have been aware that the sponsor's travel to Hawaii took place the month after she had returned from Vietnam. The fact that she could not recall when the sponsor had a holiday with other people in Hawaii indicates the parties were not living together in a shared household.
67. Overall, the Tribunal is not satisfied that the parties' living arrangements indicated they had a shared household or that the nature of any household supports a finding that they were living together in a genuine and continuing relationship at the time the applicant was claiming their relationship was genuine and continuing.

Social aspects

68. The applicant provided a statement from the sponsor's mother and from a friend claiming that the applicant and the sponsor represented themselves as being married to each other and their relationship was accepted as genuine.
69. Manh Guong Nguyen who provided one of the statements is the husband of the aunt of Duy Thanh Lai who the applicant is now sponsoring for a Partner visa and is the father of her children. Manh Guong Nguyen provided a statement in support of Duy Thanh Lai in his previous Partner visa application. He owns the restaurant where the applicant met Duy Thanh Lai. The applicant last worked for Manh Guong Nguyen in 2013, two years before she relied on his statement to support the grant of her Partner visa.

70. The Tribunal finds that Manh Guong Nguyen had an interest in providing information in support of the applicant to obtain a Partner visa as, if the applicant was in a relationship with Duy Thanh Lai, she would then be sponsoring him to be able to live in Australia. Due to this conflict of interest, the Tribunal places no weight on that statement to support any finding that the applicant and the sponsor represented themselves as being married to each other.
71. The Tribunal takes into account the fact that the sponsor's mother gave a statement in support of the application. As, if the Department's concerns that the applicant was providing false and misleading information are correct, the sponsor would have also been providing false and misleading information the Tribunal places little weight on the statement from the sponsor's mother. In that statement itself, there is little information which would indicate that the sponsor's mother has been involved in the lives of the parties or that she has observed the parties together to be able to make the claims that she has.
72. The applicant provided a number of photos of the parties together. Many of these photos show the applicant and the sponsor together with Manh Guong Nguyen. As the Tribunal has significant concerns as to whether Manh Guong Nguyen has provided information in the hope that his wife's nephew may eventually be able to live in Australia sponsored by the applicant, the Tribunal does not accept that these photos provide plausible information that the parties represented themselves as being married to each other or that their relationship was genuine.
73. There is little other information which would indicate that the social aspects of the relationship indicate the parties were ever in a genuine and continuing relationship or that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The applicant claimed she and the sponsor did not go on a holiday together. She claimed that they were trying to save money to purchase a home. Despite this, the sponsor went on holidays with friends to Bali in December 2014 and to Hawaii in December 2015.
74. The applicant was unable to provide details of who the sponsor travelled with for these holidays. In her statement provided after the hearing, she claimed that so many things have happened in her life since the end of her relationship with the sponsor that she could not remember many things. She claimed that she did not travel to Bali with the sponsor because she was busy with work.
75. The fact that the sponsor arranged to take two holidays overseas without the applicant, for whatever reason, indicates that the parties did not undertake joint social activities or were involved in each other's lives. The applicant said that she could not remember the people who the sponsor travelled with because he had a number of friends who she did not know or associate with due to her lack of English. That the sponsor would have gone overseas on two occasions with friends who the applicant did not associate with again undermines the claims that the parties undertake joint social activities or that their relationship was ever genuine.
76. The applicant travelled to Vietnam on 26 October 2015, returning to Australia on 10 November 2015. She said the main purpose of this trip was to obtain treatment arising from her suffering a miscarriage in April 2015. The sponsor only spent three days with the applicant in Vietnam, returning with her on 10 November 2015. The applicant claimed at the Tribunal hearing that the sponsor only spent three days with her as he was not able to take holidays at that time. This is despite the fact that the sponsor then arranged to travel to Hawaii for two weeks with friends a month after returning from Vietnam. The Tribunal does not accept that if the applicant and the sponsor were in a genuine and continuing relationship that the sponsor would not have been able to arrange to spend time with the applicant in Vietnam instead of arranging to have a holiday with friends in Hawaii a month

after returning from Vietnam. The fact that the applicant made this claim undermines the credibility of the information she has provided to the Tribunal.

77. Even if the trip to Vietnam was to enable the applicant to obtain treatment, the Tribunal does not accept that if the parties were in a genuine and continuing relationship with each other and had a mutual commitment to a shared life as husband and wife to the exclusion of all others that the sponsor would not have used this opportunity to travel with the applicant to Vietnam. The applicant said that her mother was with her in Vietnam. This would have provided an opportunity for the sponsor to spend time with his mother-in-law in Vietnam. It would likely provide an opportunity for the sponsor to spend time with other members of the applicant's family. That he only spent three days in Vietnam indicates a lack of commitment to the relationship or that the parties were participating in joint social activities together.
78. When the sponsor returned from his trip to Bali in 2014, he nominated his mother as his emergency contact person. At the hearing, the applicant claimed that he did this as they were using his mother's postal address as they were often moving. The Tribunal does not accept this. The details of the emergency contact person the sponsor provided were his mother's name and her telephone number. The fact that he provided this does not support the claim that the parties were representing themselves as being married to each other. It is noted that the sponsor did not nominate anyone as his emergency contact person when he returned from Hawaii in 2015.
79. After the hearing, the applicant claimed that the sponsor provided his mother's details as she claimed that his mother spoke English fluently and the sponsor does not speak much English. The Tribunal has no information as to the capacity of the sponsor's mother to speak English. It is noted that she was born in Vietnam and has lived in Australia for a number of years. The applicant was granted a Student visa to be able to study in Australia which would indicate that she has at least a basic level of English. She operates a shop in Australia and would also be required to communicate to some extent in English. The Tribunal does not accept that her level of English would not be sufficient to communicate such that if the parties were in a genuine relationship that the sponsor would not have nominated her as his emergency contact person. That he did not do so indicates that the parties did not represent themselves as being married to each other.
80. Overall, there is little credible information which would indicate the social aspects of the relationship support a finding that the parties were ever in a genuine and continuing relationship or that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The sponsor has gone overseas with friends on two occasions without the applicant. The applicant does not know who these friends were and has stated that she did not associate with the friends of the applicant because she does not speak English. There is little credible information that the parties did represent themselves as being married to each other, in particular to the friends of the sponsor with whom he travelled overseas.

Commitment to each other

81. The applicant claims that she first met the sponsor in July 2011. They were married on 17 March 2013. The applicant claims the relationship ended in October 2016, immediately after she was granted the Subclass 801 Partner (Residence) visa. They were married for a period of about three and a half years.
82. There is little information which would support the claim that the parties provided any degree of companionship and emotional support which would be expected in a genuine and continuing relationship. The applicant fell pregnant to her current husband in February 2015.

She claims that it was a “one-night stand” and that she did not have a continuing sexual relationship with her current husband at that time.

83. The applicant’s daughter was born less than a month after she was granted the Subclass 801 Partner visa. The applicant claims that it was simply because she told the sponsor that she had a “one-night stand” with her current husband that the sponsor ended his relationship with her. The Tribunal does not accept that if the applicant and the sponsor had been in a continuing relationship, including a continuing sexual relationship as the applicant claimed, over the period when [Ms A] was conceived that the sponsor would have simply accepted that [Ms A] was not his child. This is even if, as the applicant claimed, friends who saw the child made comments that they did not believe this newborn baby looked like the sponsor.
84. The Tribunal does not accept that the sponsor would have simply made a decision that [Ms A] was not his child based on no other information apart from “a mother’s instinct” and comments from friends that this newborn child did not look like him. The DNA test that was conducted to establish the paternity of [Ms A] was not done until May 2017. It appears that this testing was simply done to assist in the applicant’s new husband’s Partner visa application and that there was never a question between the applicant, her sponsor and the applicant’s new husband as to the paternity of [Ms A]. That the sponsor took no further steps to establish the paternity of [Ms A] at that time indicates there was never a question as to [Ms A’s] paternity and that the parties were not in a genuine and continuing relationship and did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others. It indicates that the parties were not living together or were in any type of relationship prior to the grant of the visa and at the time the applicant and the sponsor were providing statements claiming that they were in a genuine and continuing relationship.
85. The applicant travelled to Vietnam in October 2015 to obtain treatment after she suffered from a miscarriage in April 2015. The applicant claimed that the sponsor did not travel with her because he could not arrange time off work. The Tribunal does not accept this as the sponsor was able to arrange to have a two-week holiday with friends in Hawaii the month after the applicant returned from Vietnam. The applicant claimed that as her mother was there, she did not need the sponsor present and the treatment was not significant. In the statement she provided after the hearing, she contradicts this by stating that she was very unwell during this trip. The sponsor only spent three days with the applicant in Vietnam, accompanying her on her return to Australia.
86. The Tribunal finds that if the parties did provide the degree of companionship and emotional support that would be expected in a genuine and continuing relationship that the sponsor would have travelled with the applicant throughout this trip. If the purpose of the trip was to enable the applicant to obtain treatment and advice arising from her miscarriage, then it would be expected that the sponsor, if he was in a genuine relationship with her, would want to be with her and receive the advice as to the cause of the miscarriage or any other issue that may arise as to the applicant’s fertility. That he only went to Vietnam for three days and then had a holiday a month later with friends in Hawaii shows a lack of commitment to the applicant and to their claimed relationship.
87. The applicant claimed that she and the sponsor did not have holidays together as they were trying to save money to purchase a home and also for her business. That the sponsor went on holidays without the applicant in December 2014 and December 2015 indicates that the sponsor was not involved in any plans with the applicant for their long-term future or that he was cooperating in any plan to save money to purchase a home. This again indicates the sponsor was not committed to any claimed relationship with the applicant.
88. When the Department was assessing whether the parties were in a genuine relationship for the grant of the Subclass 801 Partner (Residence) visa an officer from the Department

attempted to contact the sponsor on a number of occasions. When the officer eventually spoke to the sponsor, instead of the sponsor being willing to speak to the departmental officer, the sponsor told him to direct his questions to the migration agent. It would be expected that if the parties were in a genuine and continuing relationship that the sponsor would be anxious to be able to assist the Department in making a positive finding as to their relationship. That he tried to deflect the departmental officer by telling him to speak to the migration agent indicates a lack of commitment to the relationship by the sponsor.

89. Despite the sponsor claiming that he was not able to speak to the departmental officer at the time he asked the Department to direct any questions to the migration agent and promising that he would make time to speak to the officer. There is no information which would indicate the applicant attempted to make time to be able to be interviewed by the officer. The officer had explained to the sponsor the reason for the interview and the types of questions that he wished to ask. Again, if the parties were in a genuine and continuing relationship it would be expected that the sponsor would be anxious to be able to take part in an interview to ensure that the visa could be granted as soon as possible. That he did not indicates a lack of commitment to the relationship and also indicates that the parties were never in a genuine and continuing relationship.
90. Overall, the Tribunal is not satisfied that the parties displayed the degree of commitment to each other which would be expected in a genuine and continuing relationship or a relationship where the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others. The sponsor, during the claimed relationship, showed little degree of companionship or emotional support for the applicant, travelling overseas on two occasions with friends for holidays while only spending three days with the applicant in Vietnam while she was seeking treatment arising from her previous miscarriage. The parties' claims as to having long-term plans were not reflected in the activities of the parties, and in particular the sponsor having holidays while the applicant was claiming they did not go on holidays together as they were saving money to purchase a home. Significantly, the fact that the applicant fell pregnant to her current husband while claiming to be in a relationship with the sponsor indicates that she did not have a commitment to a shared life as husband and wife with the sponsor to the exclusion of all others.

Overall assessment

91. The Tribunal has considered all the circumstances of the applicant and the sponsor both individually and cumulatively. The Tribunal accepts that no relationship is perfect and that even in genuine relationships infidelities occur. The Tribunal accepts that a wife in a genuine relationship may fall pregnant as a result of a "one-night stand" but this does not necessarily mean that her relationship with her husband is not genuine.
92. When considered in full, however, the Tribunal is not satisfied that the parties were ever in a genuine and continuing relationship or that they ever had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The fact that the applicant fell pregnant to her current husband at the time that she was claiming to be in a genuine and continuing relationship with her sponsor and had a mutual commitment to a shared life as husband and wife to the exclusion of all others must be given significant weight. As indicated above, the fact that she fell pregnant to her current husband is not however determinative.
93. When this fact is considered with the other evidence, however, the Tribunal finds that the parties were never in a genuine and continuing relationship or had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The fact that the sponsor had two overseas holidays with people who the applicant claims were friends of the sponsor who she did not know indicates the parties did not undertake joint social activities together and showed a lack of companionship and emotional support. The fact that the applicant spent 15

days in Vietnam obtaining treatment as a result of her previous miscarriage and the sponsor only travelled there for three days again indicates a lack of commitment by the parties. The fact that there did not seem to be any question as to who was the father of [Ms A] indicates that the applicant and the sponsor were not in any relationship at the time she was conceived.

94. The sponsor provided a statement dated 6 February 2020 claiming that he and the applicant were in a genuine and continuing relationship and the information that was provided in support of the application was not false or misleading. It appears difficult to understand why the sponsor would be providing the statement to support the applicant when it is claimed that he ended his relationship with her after she gave birth to her daughter and simply on the statement of the applicant that she had a one-night stand with her current husband and friends were saying that their newborn child did not look like the sponsor.
95. In the statement provided by the applicant after the hearing, the applicant made the following claim:
 96. I would like to state that if my relationship with my ex-husband was contrived and I had it all planned then I would have waited until I have attained my citizenship before sponsoring my current husband Duy Thanh Lai and would not have to deal with my visa being cancelled.
97. The applicant has provided no information as to the immigration status of her current husband and it is likely that he was an unlawful non-citizen at the time she sponsored him for the Partner visa. As they already had one child together, it is not surprising that they were anxious to be able to apply for a Partner visa and allow Duy Thanh Lai to be able to reside in Australia lawfully. The Tribunal does not know what advice the applicant may have received about waiting to attain her citizenship before sponsoring her husband, however, the Tribunal places no weight on this claim when assessing whether the applicant has provided false and misleading information in respect of her Partner visa application.
98. In all the circumstances, the Tribunal finds that the applicant and the sponsor were not in a genuine and continuing relationship, that they did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others and did not live together at the time the applicant provided statements to the Department making those claims. The Tribunal finds that the applicant did provide false and misleading information as alleged in the Department's notice of intention to consider cancelling the applicant's Partner visa.
99. For these reasons, the Tribunal finds that there was non-compliance by the applicant with s.101 of the Act in the way described in the s.107 notice.

Should the visa be cancelled?

100. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
101. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance, and have regard to any prescribed circumstances: s.109(1)(b) and (c). The prescribed circumstances are set out in r.2.41 of the Regulations. While these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedures Advice Manual (PAM3)

'General visa cancellation powers', which refers to matters such as the consequences of cancelling the visa, international obligations and any other relevant matters.

102. The Tribunal has considered the prescribed circumstances and all the circumstances of the applicant and any person who may be affected by the cancellation of her visa.

The correct information

103. The correct information was that when the applicant provided information to the Department in support of her Subclass 801 Partner (Residence) visa she was not in a genuine and continuing relationship with the sponsor. The Tribunal finds that at the time the applicant provided that information she was pregnant with her child with Duy Thanh Lai and that she did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others with the sponsor.
104. The Tribunal finds the applicant conspired with the sponsor and other people to provide false and misleading information to the Department in support of her application for the Partner (Residence) visa.

The content of any genuine document

105. This consideration is not relevant to the applicant's circumstances.

Was the decision to grant the visa based on the false and misleading information?

106. The decision to grant the applicant the Partner (Residence) visa was based wholly on the false and misleading information provided by the applicant. The applicant did not make any claim and she has not claimed that she was the victim of family violence or that she meets any of the alternate criteria for the grant of the visa.
107. The applicant provided documents in support of the claim that she was in a genuine and continuing relationship with the sponsor. She provided information to say that she was pregnant, insinuating that the child was the sponsor's child, however, claiming that immediately after the birth of the child her "mother's instinct" meant that she knew he was not the father.
108. If the applicant had not provided the false and misleading information the Department would have found that she was not the spouse, as defined in s.5F of the Act, of the sponsoring partner and her application for the Subclass 801 Partner (Residence) visa would have been refused.
109. The Tribunal finds that the applicant generated false information with the assistance of her sponsor and other people to provide the impression that she was in a genuine and continuing relationship with her sponsor when this was not the case. The fact that the applicant conspired with other people to provide false and misleading information to the Department to support her application must be given significant weight when considering whether her visa should be cancelled.

Present circumstances of the applicant

110. The applicant first entered Australia in 2010 holding a Student visa. Since then she has lived primarily in Australia although has returned to Vietnam on a number of occasions since then. She is now married to Mr Lai and is sponsoring him for a Partner visa. That application was refused on the basis that the applicant's visa had been cancelled and that he was not sponsored by a person who had the right to reside permanently in Australia. That refusal is

currently under review by the Tribunal. They have two children together, [Ms A] currently [age] years old and [Master B] who is currently [age] years old. Both [Ms A] and [Master B] have spent extended periods of their lives since they were born living in Vietnam and being cared for by the applicant's mother and mother-in-law.

111. Both the applicant and her husband are Vietnamese nationals and would be able to return to Vietnam and live there together. The fact that the applicant has previously arranged for her two children to spend extended time being cared for by their grandmothers in Vietnam indicates that they have been able to live in Vietnam and receive appropriate support there without any issues. The effect on the applicant's children that the cancellation of the applicant's visa would have is considered further below.
112. The applicant owns a business, however, little information has been provided as to the details of that business, including its profitability, the number of staff who are dependent upon the continuation of that business and the future prospects of that business. There is no current information as to the business before the Tribunal. The Tribunal accepts the applicant has been successful in establishing a business in Australia and has used the money that she has saved to be able to purchase a house. There is little other information before the Tribunal as to her current financial situation and very limited information has been provided as to the financial circumstances of the applicant disclosed above. No evidence was provided to explain how the applicant could have raised \$200,000 and borrowed a further \$600,000 to purchase the home.
113. The Tribunal takes into account that the applicant has been living in Australia for more than 10 years and that she has tried to establish herself in Australia. The Tribunal takes into account the other members of the applicant's family and her employees who would be adversely affected if the applicant's visa was cancelled.

Subsequent behaviour of the applicant

114. The applicant provided a timely response to the notice of intention to consider cancelling her visa. In her response, the applicant denied that she had provided false and misleading information to the Department when she claimed that she was in a genuine and continuing relationship with the sponsor. She obtained from the sponsor a further statement where he claimed that his relationship with the applicant was genuine. As set out above, the Tribunal has found this claim to be false and that the parties were not in a genuine and continuing relationship.

Other instances of non-compliance

115. In the Department's decision, a copy of which the applicant provided to the Tribunal, the delegate notes that after arriving in Australia on a Student visa the applicant swapped courses multiple times. Her enrolments were cancelled due to non-commencement of studies, unsatisfactory attendance and non-payment of fees.
116. It was argued by the applicant's agent that the applicant completed three courses while in Australia, those being a Certificate IV in Business in August 2011, a Diploma of Business in November 2011, and an Advanced Diploma of Management in June 2012. She was then enrolled in a Bachelor of Business (Management) from 9 July 2012 which was subsequently cancelled. Before it was cancelled the applicant had applied for a Partner visa and had been granted an associated Bridging visa.
117. The Tribunal accepts that she was not in breach of any of her Student visas prior to her applying for a Partner visa. This factor weighs in favour of the applicant.

The time that has elapsed since the non-compliance

118. The non-compliance occurred in 2015 when the applicant was claiming that she was in a genuine and continuing relationship with her sponsor and that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. The applicant was granted the Subclass 801 Partner (Residence) visa on 19 September 2016. Three and a half years have now passed since that visa was granted. The child she had with her husband, [Ms A], was born within a month of her being granted the visa.
119. It seems strange that if the Department had concerns as to the genuineness of the applicant's claimed relationship with her sponsor at that time that they did not wait until after the birth of the applicant's child and then request DNA testing rather than grant her the visa a month before the stated expected date of birth.
120. The notice of intention to consider cancelling the applicant's visa was sent to the applicant almost two years after the applicant sponsored her husband for his Partner visa, providing information to show that [Ms A] was not the child of her sponsor and raising questions as to the genuineness of any relationship that the applicant had with her sponsor. The fact that both the applicant and her husband have suffered delay in assessing the cancellation of the applicant's visa and the assessment of the husband's Partner visa must be given some weight in the applicant's favour.

Any breaches of the law

121. There is no information before the Tribunal which would indicate the applicant or any members of her family have breached the law in Australia or anywhere else.

Contribution to the community

122. It was submitted that the applicant pays tax and provides a positive contribution to Australian society. Apart from the payment of tax, which is her obligation under Australian law and from which she obtains services provided by the government, there is no information to indicate that the applicant has contributed to the Australian community. The Tribunal places no weight on this aspect when considering whether the applicant's visa should be cancelled.

Other relevant considerations

123. Although there will be no consequential cancellations if the applicant's visa is cancelled, there are a number of other people who will be directly adversely affected if the applicant's visa is cancelled.
124. The applicant is currently sponsoring her husband for a Partner visa. If her visa is cancelled, her husband is unlikely to be granted a Partner visa as he is not sponsored by an Australian citizen, permanent resident or eligible New Zealand citizen. Little information has been provided as to the circumstances of the applicant's husband or his situation in Vietnam or in Australia. He was previously sponsored for a Partner visa by another person however withdrew that application. He remained in Australia as an unlawful non-citizen.
125. Although the applicant's husband may wish to be able to remain in Australia, he is also a national of Vietnam. If the applicant's visa is cancelled, she will be able to return to Vietnam with her husband and they will be able to reside in Vietnam together. The Tribunal is not satisfied that as the applicant is sponsoring a fellow citizen from Vietnam for a Partner visa it is a reason that should be considered in her favour when considering whether the visa should be cancelled.

126. The applicant and her husband have had two children together. As their mother had the right to reside permanently in Australia at the time of their birth they have been given Australian citizenship. Both children have travelled to Vietnam and spent extended time in Vietnam away from their parents. The applicant stated that they were being cared for by her mother and mother-in-law as she and their father were busy in their businesses and general lives.
127. The fact that the children are Australian citizens must be given significant weight when considering whether the applicant's visa should be cancelled. The children have, however, been able to live in Vietnam and have been supported by the applicant's family and the family of their father. It is likely that they would continue to receive the support that the applicant's family have provided to them in the past and her family have also provided to her and her siblings. The applicant's evidence before the Tribunal was that her father had a successful business renting out property he owns.
128. The Tribunal has taken into account the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights with regards to the best interests of a child. If the applicant's visa is cancelled, it is likely that both she and her husband will return to Vietnam where they will obtain the support of the applicant's family. The children will be able to travel with them and live with their parents in Vietnam. The applicant has shown herself to be a person of considerable drive and initiative in being able to establish her own business in Australia and purchase a property here. It is likely that if she returns to Vietnam she will be able to use the skills that she has developed in Australia to be able to find work to support herself and her children. The children have spent a considerable period of their short lives in Vietnam being cared for by their grandmothers without their parents and it is likely they have good relationships with their extended family in Vietnam.
129. If the children are residing in Vietnam it is likely that they will not obtain many of the benefits available to children residing in Australia. This includes such things as health care and education. This must be given significant weight when considering whether the applicant's visa should be cancelled.
130. There is no information which would indicate that the applicant would have any difficulties returning to Vietnam. She has travelled to Vietnam on multiple occasions since first arriving in Australia in 2010. She has the support of her parents in Vietnam who have provided extensive assistance in the care of her children. There is nothing to indicate that she would have any difficulties in returning to Vietnam or living there.

Overall assessment

131. Significant weight must be placed on the circumstances of the applicant providing false and misleading information in support of the application for the Partner (Residence) visa. The integrity of Australia's immigration system is based on the requirement that all people dealing with the Department, both applicants and sponsors, provide complete, correct and up-to-date information in every detail.
132. For the reasons set out above, the Tribunal has concluded that the applicant provided false and misleading information when she declared that she and the sponsor were in a genuine and continuing relationship and they had a mutual commitment to a shared life as husband and wife to the exclusion of all others. In providing this information, the applicant has conspired with other people, including the sponsor, to provide false and misleading information. In providing this information the applicant did so knowing that she was pregnant to her current husband and used the fact that she was pregnant at the time to support her claim that she was in a genuine relationship with the sponsor.

133. Apart from providing the false and misleading information in respect of her Partner visa application, there is nothing to indicate that the applicant is not otherwise of good character. She owns a business and has been able to save her money to purchase a home in Sydney.
134. The most significant factor to take into account when considering whether the applicant's visa should be cancelled is the effect that the cancellation would have on her children. As indicated above, it is likely that the applicant will not have any right to be able to remain in Australia and she and her husband will return to Vietnam. The applicant would be subject to Public Interest Criterion 4013 which would prevent her from the grant of certain visas for a period of three years and it is doubtful that she would be eligible for the grant of any other visa in the foreseeable future. It is likely that the applicant and her husband will take their children with them when they return to Vietnam. As set out above, the opportunities that are available to the applicant's children while they live in Vietnam will be less than the opportunities they would have otherwise had living in Australia. Despite this, they will still have a love and affection of their parents and also their extended family who have already provided significant personal support to them over the period they have been living in Vietnam while the applicant and the sponsor have remained in Australia.
135. After considering all the circumstances of the applicant, the other members of her family and her employees who would be affected by her visa cancellation, the Tribunal finds that the weight of evidence supports a finding that the visa should be cancelled. The Tribunal has found that the applicant deliberately provided false and misleading information at the time she provided information for the grant of her Subclass 801 Partner (Residence) visa. Despite claiming that she did not provide false and misleading information, the Tribunal finds that she is continuing to provide false information by maintaining that her relationship with the sponsor was genuine. She has again conspired with her sponsor for him to provide information in support of the application which the Tribunal finds was false and misleading.
136. After considering all the circumstances, the Tribunal has concluded the weight of evidence supports a finding that the applicant's visa should be cancelled.
137. The Tribunal has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

DECISION

138. The Tribunal affirms the decision to cancel the applicant's Subclass 801 (Partner) visa.

Hugh Sanderson
Member

ATTACHMENT – Migration Act 1958 (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and

- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
- (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.